No. 11864

# In the United States
# CIRCUIT COURT OF APPEALS
## for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

*Appellant,*

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

*Appellee.*

## REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon.



DEWEY H. PALMER,
501 U. S. National Bank Bldg.,
Portland, Oregon,
*Attorney for Appellant.*

HART, SPENCER, MCCULLOCH & ROCKWOOD,
CHARLES A. HART,
MANLEY B. STRAYER,
Room 1410 Yeon Bldg.,
Portland, Oregon,
*Attorneys for Appellee.*

STEVENS-NESS LAW PUB. CO., PORTLAND

## TOPICAL INDEX



## TABLE OF AUTHORITIES CITED

### Statutes



### Cases

No. 11864

# In the United States
# CIRCUIT COURT OF APPEALS
## for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

*Appellant,*

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

*Appellee.*

## REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon.

### ARGUMENT

When Appellee states that the term "alcohol in bond" has a "well-defined meaning in law which is derived from Chapter 26 of the Internal Revenue Code (26 U.S.C.A. 2800 et seq.)" it resorts to the same method of interpretation as that of the Railroad Company in *St. Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons,* 255 U.S. 252, 41 S. Ct. 269. The appellee reads the "Code" and its tariff too narrowly. In *St. Louis I. M.*

*& S. Ry. Co. v. Hasty & Sons,* the dispute arose over alleged overcharges on rough material shipped to mills for manufacture into heading for barrels. We quote from the opinion by Mr. Justice Pitney (p. 270 of 41 S. Ct.):

> "Appellant's" (railroad) "contention is based upon a literal reading of the opening sentence of Item 79: 'Rough material rates applicable on rough lumber, staves, flitches, bolts and logs,' etc. and since 'rough heading' is not mentioned here, while the associated material 'staves' is specified, it is contended that rough heading is not provided for.
>
> "From the testimony taken before the master it would appear that the raw material from which barrel heads are made is variously described as rough heading, sawed heading, split heading, and bolts or heading bolts; but it also appears that, whatever may be the distinctions, the terms are used loosely and indiscriminately in the trade and in billing shipments, material of either description being considered rough material, and all having been handled by the railway company under the rough material rate on its own schedules without regard to particular terms.
>
> "We regard appellant's reading of Item 79 as altogether too narrow. The scope and effect of the rough material rates should be determined not by regarding the opening sentence alone, but by looking also to the list of finished products to be manufactured from the material, and considering the general purpose of Item 79. * * *"

As in the instant case, the Railway Company in the above discussed "barrel stave" case cited *Texas & Pacific Ry. v. American Tie Co.,* 234 U.S. 138, 146, 34 S. Ct. 885, 58 L. Ed. 1255, (cross ties case discussed in Appellant's opening brief p. 14 and in Appellee's brief p. 8)

in support of its contention that the construction was a matter for the Interstate Commerce Commission. The Court dismissed this contention by stating that the matter was "so free from doubt that there is no occasion to apply to the commission for a construction as insisted by appellant under Texas & Pacific Ry. v. American Tie Co. * * *."

It is submitted that the same rule was applied in this barrel stave case as was applied in the "emigrant moveables" case, *Chesapeake & O. R. Co. v. U. S.*, 1 Fed. Supp. 350, discussed in our opening brief at page 10, viz: that mere reading of the terms or words of the respective classifications is not sufficient in interpreting the tariff, but that the Court may consider the historical and practical and fundamental reasons involved in the making of the classifications.

In *Penn. R. Co. v. U. S.* (Court of Claims), 42 F. (2) 600, cited in Appellant's Opening brief (pp. 12 and 13), the surgical bandages case, the Court indicated the characteristics to be considered by the Court in making the classification and said that if the specific article is "devoid of features, character and use * * * and possesses no characteristics which bring it within the specific classification * * * then of course it falls within the comprehensive and general classification of N.O.I.B.N."

So that in this case in order to entitle the Appellee to charge the higher rate and "automatically" place the subject Alcohol in the NOS classification, it must be

determined that the shipment possesses no characteristic which brings it within the specific classification. Appellee attempts to do this by "deriving" a well-defined meaning in law of the term alcohol in bond from its reading of the Internal Revenue Code, 26 U.S.A. 2800 et seq. Appellee's counsel states (Appellee's brief pp. 4 and 5) that this "code deals with taxes on distilled spirits and sets up a system of control to insure collection of the tax" and then proceeds to argue its version of what a well defined meaning in law of the term alcohol in bond is. But in its argument it makes a very significant omission. Such omission is the salient feature that the alcohol shipped was at all times during shipment owned by the United States Government, tax-free, and was so described in the bills of lading (Tr. p. 34, Appellant's opening brief p. 5 and p. 10). To follow Appellee's argument to its logical conclusion would result in the United States Government giving bond to itself when shipping alcohol transported under permit as provided for by law. The Defense Supplies Corporation is the United States Government. *Defense Supplies Corporation v. U. S. Lines,* 148 F. (2) 311; *Southern Pacific Co. v. RFC,* 161 F. (2) 56, 59 (C.C.A. 9th). The very system of control which Appellee mentions in its brief to insure collection of tax and from which this well-defined meaning in law of the term alcohol in bond is "derived" by Appellee provides a device for the handling and transportation of United States Government owned alcohol for use by the United States and its instrumental-

ities (Appendix 1, Appellant's opening brief). It is undisputed that such a device was used in this case. A proper evaluation of this feature and characteristic will support a finding that the alcohol was actually "in bond" within the sense of Item 1563.

An additional characteristic that may be considered in making the classification of this shipment or in identifying the commodity as to which Item of the tariff is applicable, is the value of the alcohol and the liability of the carrier for the transportation. The alcohol without tax was worth 60 cents a gallon. The tax at the time of shipment was $6 per 100 proof gallon or about $9.60 per 160 proof gallon.

Respectfully submitted,

DEWEY H. PALMER,
Attorney for Appellant.